Supreme Court, U.S.
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92-1334

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

NO. _____

STEVE WYNNE,
Petitioner

V.

TUFTS UNIVERSITY SCHOOL OF MEDICINE,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

Whether a dyslexic medical school student with documented difficulty in taking written (Type-K) multiple choice tests is entitled to a jury trial under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. s. 794 ("Section 504"), to determine whether he is "otherwise qualified" when an academic institution claims that it cannot accommodate him by providing any alternative to written multiple choice examinations without compromising its academic standards.

Whether evidence of statements by key academic decision makers suggesting disbelief that a learning disabled student's condition was a handicap and suggesting belief that a medical school was no place for persons with learning disabilities raises sufficient issues of material fact as to pretext or

unconscious prejudice as to preclude summary judgment on the issue under Section 504.

Whether a learning disabled claimant under s. 504 is entitled to conduct discovery to determine the criteria used by an academic institution in deciding to accommodate him by providing alternative testing procedures.

Whether a learning disabled claimant has a right to a jury trial on the issue of whether an academic institution had sufficient notice of his handicap to require an alternative to written multiple choice testing.

Whether the Court of Appeals has improperly decided issues of material fact in ruling that an academic institution has not failed reasonably to accommodate an otherwise qualified handicapped person who was required to

pass a Type-K written multiple choice examination in Biochemistry although his handicapped impaired his ability to demonstrate his true knowledge and ability through such an examination.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Steven Wynne, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the First Circuit Court of Appeals entered in the above-entitled case on October 6, 1992.

OPINIONS BY OTHER COURTS

The opinion of the United States Court of Appeals for the First Circuit No. 92-1437, October 6, 1992 is reproduced in the Appendix hereto, page A.1. The Memorandum of Decision of the United States District Court for the District of Massachusetts, March 2, 1992, is reproduced in the Appendix hereto, page A. 116.

The matter was previously considered by the United States Court of Appeals for the First Circuit en banc, and reported

at Wynne v. Tufts Medical School, 932 F.2d 19 (1st Cir. 1991). Said opinion of April 17, 1991, No. 89-1670, is reproduced in the Appendix hereto, page A. 115. The opinion of a three judge panel of said court of April 30, 1990, is reproduced in the Appendix, page A. 77. Memorandum of Decision in the United States District Court for the District of Massachusetts, No. 88-1105-Z, May 17, 1989, is reproduced in the Appendix hereto, p. A. 121.

An earlier Memorandum of Decision, United States District Court for the District of Massachusetts, No. 88-1105-Z, March 21, 1989, is reproduced in the Appendix hereto, p. A. 123.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit (Appendix hereto, p. A.1) was entered on

October 6, 1992. A timely petition for rehearing was denied on November 5, 1992 (Appendix hereto, p. A.126). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. s. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

U.S. CONST. AMEND. VII-CIVIL TRIALS

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .

FED. REHAB. ACT 1973 s. 504, 29 U.S.C. s. 794:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financing assistance.

STATEMENT OF THE CASE

Petitioner, Steven Wynne ("Wynne" or "petitioner"), thirty-one years old, holds a masters degree in biology but is handicapped with a significant and severe specific language/learning disability, commonly known as dyslexia. See Affidavit of Vincent Perlo, M.D. ("Perlo Affidavit"), reproduced in the Appendix, p. A. 127. As a result of his learning disability, Petitioner has difficulty with passive constructions, difficulty with double and triple negatives, difficulty discriminating part/whole relationships, difficulty with connotative meaning of words and sequencing difficulty. See Plaintiff's Answers to Defendant's Interrogatory No. 1, reproduced in the Appendix hereto, p. A. 131. This impairs his ability to answer written multiple choice questions, but does not reflect that his

intelligence is anything but normal. Perlo Affidavit, para. 6, p. A. 128. Indeed, when administered a non-verbal test of intelligence, his overall level fell at the 95th percentile, within the "intellectually superior" range. Report of Argie Tiliakos, Licensed Psychologist, reproduced herein in the Appendix, p. A. 164. Petitioner has the motivation and basic ability successfully to complete a medical education. Affidavit and Letter of Helaine M. Schupack, Reading Therapist, Language Disorders Unit of the Massachusetts General Hospital, reproduced herein in the Appendix, pp. A. 181-186.

Petitioner was unconditionally admitted to the Tufts Medical School in 1982. See Affidavit of Dean Henry Banks, M.D., Appendix, p. A. 188, para. 1; Affidavit of Steven Wynne, p. A. 194,

para. 8; Plaintiff's Answer to Defendant's Interrogatory No. 3, p. A. 134. After failing eight courses in the 1983-84 academic year, he was permitted to repeat his first year. Banks Affidavit, paras. 5-6, pp. A. 189-90.

Petitioner was administered a neuropsychological evaluation in July, 1984 at the request of respondent. See Affidavit of Barbara Chase, M.D. ("Chase Affidavit"), p. A. 205. The evaluation by Celaine Rey-Casserly, Ph.D., revealed that petitioner had:

> average general cognitive abilities with marked variability among individual skills. Significant strengths were noted in conceptual thinking and reasoning abilities. In contrast, Mr. Wynne encountered serious difficulties processing discrete units of information in a variety of domains, both verbal and non-verbal. Formal language testing revealed insecurities in linguistic processing including inefficient retrieval and retention of information. This type of neuropsychological profile has been identified in the

learning disabled population. Id., Exhibit "A," pp. A.219-20. Dr. Rey-Casserly noted that "Volume of material per subject, the number of subjects as well as the examination procedures [emphasis added] constitute multiple stresses on Mr. Wynne's ability to compensate." Id., pp. A. 220-21. She recommended "[a]ssistance in developing strategies to handle complex written materials and to monitor details [which] may require an inordinate amount of intensive remedial work." Id., p. A. 221.

In August 1984, petitioner was informed that, as a condition for remaining at Tufts, he would have to repeat all of the courses he had previously passed and audit and take exams in all other courses in which he had received "low-pass" (which had not been required of at least one other

student who had failed the first year). See Wynne Affidavit, para. 18, p. A. 199. These requirements meant that petitioner was in fact subject to the same pressures under which he had previously been unable to succeed; but petitioner followed each of respondent's directives, repeated all the courses, arranged to tape lectures and for a note taker, participated in tutoring and otherwise cooperated with the school's requirements. Id., paras. 13-16, p. A. 197-198.

In complying with respondent's requirements, petitioner took advantage of every tutoring opportunity of which he was aware. Id., para. 14, p. A. 198. Such tutoring that was available, however, was not designed for persons with learning disabilities. Id., para. 13, A. 197. When petitioner sought to obtain tutoring from persons with

knowledge of dyslexia, they lacked necessary knowledge in the subject matters of his classes. See Plaintiff's Answer to Defendant's Interrogatory No. 5, p. A. 145.

In spite of such obstacles, as a result of his concentrated efforts, petitioner succeeded in passing all courses except biochemistry. Wynne Affidavit, para. 21, p. A. 201; Banks Affidavit, para. 9, pp. A. 190-91. Although petitioner complained that his handicap made it extremely difficult to succeed with multiple choice (Type K) exams, respondent refused to accommodate him with an alternative, such as an oral examination. See Plaintiff's Answer to Defendant's Interrogatory No. 4, p. A. 141, paras. 18-20; Answer to Interrogatory No. 5, p. A. 144.

Significantly, in comparison with his difficulties with multiple-choice

examinations, Wynne received substantially higher scores in practicum, a time-measured examination which reflected not only his ability to learn complicated material, but also to understand, assemble and apply it under time constraints, conditions closer to the actual practice of medicine than multiple-choice examination. Wynne Affidavit, para. 23, p. A. 202. In each of his examinations at Tufts, Wynne did consistently and significantly better in the non-multiple-choice portions than in the multiple-choice portions to the examinations.[1]

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[1] For example, during the 1983-84 academic year, he obtained a 40% correct on exclusively multiple-choice questions in three examinations in anatomy as compared to 78% correct on three corresponding practicum examinations. See Affidavit of Steven Wynne, p. A. 224, para. 4. In the 1984-85 academic year, he obtained a mean of about 58% correct on exclusively multiple-choice questions

On numerous occasions, Wynne brought his problem with written multiple-choice examinations to the attention of relevant decision makers. On October 28, 1983, he met with Dean Marilyn Griffin and told her about the problems he was having with multiple-choice examinations. She told him to tell his professor that he was "trying." Id., p. A. 234, para. 23. On March 15, 1984, Wynne again discussed his problems with multiple-choice (Type K) questions with Griffin, and was told, until the medical school has changed, that is the way you will be tested all the rest of your life . . .

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on three examinations and a mean of about 83% correct on three corresponding practicum examinations in anatomy. He ranked in the top 30% of the class in anatomy for that year. Id., pp. A. 224-5, para. 5. In the 1983-84 physiology examinations, he obtained a mean of 53% correct on multiple-choice questions and the entire course at a mean of 82% correct on true/false in matching questions. Id., pp. A. 225-6, para. 7. Wynne passed with honors in histology.

It's time to stop fishing and cut bait." Id., pp. A. 234-5, paras. 24-25. On March 20, 1984, the Wynne discussed his problems with (Type K) multiple-choice questions with the undergraduate Dean, Dr. Lon Curtis. Id., p. A. 235, para. 27. On June 15, 1984, he met with Deans Chase and Griffin, and again called their attention to the significantly higher scores he had obtained on practicum short answer in essay and on multiple-choice (Type K) questions. He was told by Chase that "something we can look into." Id., p, A. 236, para. 28. There is no evidence that any steps were ever taken to address this problem.

On June 20, 1984, Wynne again brought his problems with multiple-choice (Type K) questions to the attention of the promotion committee. Id., pp. A. 236-37, para. 29. Wynne was then tested by

neuropsychologist, Rey-Casserly. Although, based on the Rey-Casserly report, Dr. Bush once mentioned "special tests" as a potential remedial step for Wynne, pp. A. 239-40, para. 33, at no time was Wynne offered any alternative to the (Type K) multiple-choice tests in those cases in which they were administered to other students. Indeed, on August 30, 1984, Dean Griffin explicitly told Wynne that the promotional committee would not accept individualized oral examinations. Id., pp. A. 240-41, para. 36.

Although Wynne was offered various tutors of questionable qualification to prepare for the third biochemistry exam, pp. A. 242-43, para. 38-40, he was required to take the biochemistry exam which was in the usual multiple-choice format. When he again failed, Wynne asked his professor, Dr. Krinsky, about

the possibility of an oral exam and was informed by Krinsky that he had no knowledge of Wynne's disabilities and had never been informed to teach Wynne or test him in any fashion differently from any other medical student. Id., pp. A. 243-44, para. 42. At the Student Appeals Committee on September 11, 1985 Wynne again raised the issue of his problems with multiple-choice (Type K) exam questions, and Dr. Feinblatt misinformed the committee that, in fact, the biochemistry exam had been an essay. Id., para. 43.

Relevant decisionmakers at Tufts repeatedly made statements indicating that either they did not believe that Wynne was truly learning disabled or indicating their perception that there was no place for learning disabled students at Tufts. For example, on

August 6, 1984, Dr. Betsy Bush, who had been assigned as Wynne's advocate before the Promotions Committee, informed him that "Tufts is no place for a person with a learning disability," suggesting that Wynne "go be an airplane pilot." Id. p. A. 238, para. 32. She criticized Wynne's expectation of "special treatment." Id. On August 21, 1984, Dean Banks told Wynne that he did not believe that Wynne had a learning disability, commenting "I don't care what these tests say, I've worked with kids with learning disabilities before." Id., p. A. 240, para. 34. On August 30, 1984, in response to his request for attention to the need for problem with multiple-choice examinations, Dr. Dean Griffin told Wynne, "That's the way it is . . . the school already threw you out. The faculty feels that they should be the ones to decide who they teach medicine

to, not the Deans." Id., para. 36. At the Student Appeals Committee meeting on September 11, 1985, Dr. Salem expressed the opinion that Wynne was merely seeking "special treatment." Id., pp. A. 244-45, para. 43.

On September 24, 1985, petitioner was dismissed. He thereafter confirmed his dyslexia through testing at the Massachusetts General Hospital Language Disorder Unit and demonstrated that with proper tutoring and drilling he can improve his reading proficiency. See Report of Dr. Argie Tiliakos of the Massachusetts General Hospital Language Disorders Unit, p. A. 179-80; Perlo Affidavit, paras. 6-7, pp. A. 128-29; Affidavit of Helaine M. Schupack, p. A. 181.

According to the former Director of the Language Disorder Unit of the

Massachusetts General Hospital, with proper work in remedial reading petitioner would probably succeed even with multiple choice (Type K) testing. See Perlo Affidavit, para. 8, p. A. 129. Mr. Wynne needs an individual tutor knowledgeable in medical terminology and subject matter who has received several hours of training relative to Mr. Wynne's specific needs. See Schupack Affidavit, para. 4, A. 181-2.

Petitioner brought an action in the Superior Court for the County of Suffolk, Massachusetts, seeking monetary damages and equitable relief from his dismissal from Tufts, claiming, inter alia, that Tufts has violated his rights under Section 504 in that he is otherwise qualified and is being denied a medical education solely because of a handicap which impairs his ability to take multiple choice (Type K) examinations.

On May 11, 1988, the action was removed by respondent to the United States District Court for the District of Massachusetts, claiming its original jurisdiction under 28 U.S.C. ss. 1331 and 1441(6).

On or about September 23, 1988, Wynne noticed the depositions of certain of Tufts's relevant decision makers, including that of Dean Henry Banks, M.D., for October 24, 1988. On or about October 3, 1988, Tufts moved for a protective order staying discovery until the district court ruled on its motion for summary judgment, which order suspending discovery entered on October 19, 1988, before the scheduled deposition of Banks. See A. 124. Despite his requests therefor, petitioner has since been precluded from conducting any

further discovery.

On or before October 14, 1988, Tufts moved for summary judgment, relying in part on the affidavit of Dean Henry Banks for the proposition that Tufts' use of the written Type-K multiple choice examination was a matter of substance designed to measure the ability to practice medicine. On March 21, 1989, Tufts's motion for summary judgment was denied because "questions of fact remain regarding both the reasonableness of the accommodations made by the respondent and the extent to which respondent adhered to the program it did devise for petitioner." See A. 123-24. Upon Tufts' motion, the court reconsidered and on May 17, 1989 entered summary judgment for Tufts. In its memorandum of decision, the district court found that "[s]ince

plaintiff clearly has not been able to meet the academic requirements of Tufts school, he cannot be deemed to be 'otherwise qualified.'" See A. 122.

Wynne appealed under 29 U.S.C. s. 1291. On April 30, 1990, after a hearing before a three-judge panel, the United States Court of Appeals for the First Circuit reversed and remanded the summary judgment to the district court. See p. A. 77. Thereupon Tufts petitioned for rehearing en banc. The petition was granted on August 21, 1990, the panel's opinion was withdrawn and the judgment of the three-judge panel vacated. See p. A. 115.

Upon rehearing en banc, the Court of Appeals set aside summary judgment under section 504 and remanded for further proceedings on the issue of whether Tufts had reasonably accommodated Wynne. See

pp. A. 25-67; Wynne v. Tufts University School of Medicine, 932 F.2d 19 (1st Cir. 1991). The Court of Appeals opined that summary judgment would be possible only if Tufts submitted "a factual record indicating it conscientiously carried out [its] statutory obligations" and submitted "undisputed facts demonstrating that the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lower academic standards or requiring substantial program alteration . . ." Id. at 25-26; p. A. 55. Upon remand, Tufts submitted affidavits averring inter alia, that "there are very strict limits in

[Tufts'] ability to alter [its] medical school program . . . to accommodate students with learning disabilities." Affidavit of B. David Stollar, M.D., p. A. 261, para. 16. It stated that the multiple choice exam is a fair and comprehensive way to make "subtle distinctions based on seemingly small but significant differences in written information." Id., p. A. 261. Although it did not further describe those limits, what alternatives had actually been considered for eliciting evidence of such ability from Wynne, or what alternatives might otherwise meet their specific goals for biochemistry exams--evidence of "the recognition of basic information in biochemistry" and "ability to reason through problem," id., para. 7--the district court again granted summary judgment, pp. A. 116, and was upheld by

the Court of Appeals.

Wynne had requested but was again precluded from conducting any discovery relating to Tufts's decision making process, consideration of alternatives to written multiple-choice testing, or discriminatory attitudes toward him as a handicapped person.

The Court of Appeals in upholding summary judgment, apparently gave no weight to petitioner's own direct evidence of efforts to be accommodated; to evidence that his requests for accommodation were ignored; to evidence that the decisionmakers did not take his handicap seriously or felt it should disqualify him from a medical education; to evidence that the Brown University Program in Medicine permits administration of oral examinations to dyslexic students upon request, see Affidavit of Stephen R. Smith, M.D., pp. A. 263-64; or

Stephen R. Smith, M.D., pp. A. 263-64; or to evidence that the National Board of Medical Examiners ("NBME") routinely accommodates dyslexic examinees by providing readers. See Affidavit of Ann M. Schultes, pp. A. 268-69.

ARGUMENT

Petitioner has been denied the opportunity to prove to a jury that respondent Tufts Medical School refused to accommodate him in its administration of a written Type-K multiple choice biochemistry examination and thereby discriminated against him on the basis of his handicap in violation of Section 504. He presented evidence that he is dyslexic, that his handicap interferes with his ability to demonstrate his competence through the written multiple choice format, that the respondent knew or had reason to know of his handicap and its interference with his performance in

such an examination format, that at least one other prestigious medical school finds a means adequately and fairly to test dyslexic students' knowledge in biochemistry and other courses by other than the written multiple choice format, that even the NBME manages to accommodate dyslexic students and its testing procedures and that respondent has refused to provide an alternative.

The district court, upheld by the Court of Appeals, refused to permit petitioner to discover the respondent's decision-making process and, based on the unilateral averments of certain of respondent's decision makers that they have made an academic decision that deviation from the written multiple choice format is impossible to reconcile with preservation of its academic standards, entered summary judgment for

respondent. The First Circuit has thereby created a form of qualified immunity for academic institutions which precludes even discovery by a claimant under section 504. See p. A.55-56; Wynne, 932 F.2d at 26. This is without precedent and denies petitioner his basic rights under that statute and under the seventh amendment.

The question of the scope of Section 504's protection to the learning disabled in the academic testing context is an important question of federal law which has not but should be settled by the Court. Furthermore, in granting summary judgment without permitting discovery to the claimant on this issue central to his claim, the Court of Appeals adopted procedures which so far deviate from the accepted usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of

supervision. The decision below also conflicts with applicable decisions of this Court and of other circuits concerning when summary judgment is appropriate in the application of section 504 to persons suffering from dyslexia in the the academic context and in the context of standarized testing.

I. THIS CASE INVOLVES THE IMPORTANT FEDERAL QUESTION OF BALANCING THE RIGHTS OF LEARNING DISABLED STUDENTS UNDER SECTION 504 WITH AN ACADEMIC INSTITUTION'S CLAIM OF ACADEMIC FREEDOM, WHICH QUESTION SHOULD BE SETTLED BY THIS COURT.

Approximately 3 million Americans have one or more physical or mental disabilities:

> [S]ociety has tended to isolate and segregate individuals with disabilities, and . . . such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem . . . persist[ing] in such critical areas as . . . education. [They have been] subjected to a history

> of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in and contribute to society . . .

42 U.S.C. s. 12101(a)(1990)("Americans with Disabilities Act").

Congress first began seriously to address these problems in 1973 with passage of the Rehabilitation Act, including section 504. Modeling it after Title VI of the Civil Rights Act of 1964, "[C]ongress intended Section 504 to be a broad civil rights act aimed at providing equal opportunities for the handicapped." Notes, Accommodating Learning Disabled Students in Higher Education: Schools' Legal Obligations Under Section 504 of the Rehabilitation Act, 32 B.C.L. Rev. 1051, 1053-1054; S. Rep. no. 1297, 93rd

Cong., 2d Sess. 120, reprinted in 1974 U.S. Code Cong. and Admin. News at 6390. See also Nathanson v. Medical College of Pennsylvania, 926 F.2d 1368, 1385 (3rd Cir. 1991).

Approximately 1.3 million out of 12 million postsecondary students are handicapped. Vogel, Extrinsic and Intrinsic Factors in Graduation and Academic Failure among LD College Students, 40 Annals Dyslex. 119, 120 (1990), citing U.S. Dept. of Education (1987). Thirty-six per cent of all handicapped postsecondary school students (or approximately 468,000), in the 1988-89 school year reported being handicapped also reported having a learning disability. Accommodating Learning Disabled Students, 32 B.C.L. Rev. at 1051; citing Clark, National Assessment of Handicapped Student Survey Programs in Postsecondary Education: Survey of Programs, 4 (1990);

c.f. Vogel, 40 Annals Dyslex. at 120.

> Learning disabilities are often misunderstood and are sometimes not detected at all. Even when specialists detect these disabilities, learning disabled students have been labeled as uneducable or underachievers. Only recently have specialists begun to understand learning disabilities and recognized them as true handicaps.

Accomodating Learning Disabled Students, [2] 32 B.C.L.Rev. at 1082 (footnotes omitted).

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[2] In a Buffalo Law Review article, The Judge Who Could Not Tell His Right from His Left and Other Tales of Learning Disabilities, 37 Buffalo L. Rev. 739 (1989), Judge Jeffrey Gallet describes his struggle with learning disability, including academic failures. Not aware that he suffered dyslexia until he was thirty-four years old, Judge Gallet states he "assumed that I just wasn't too bright. If I worked a little harder than everyone else, I would be able to keep up. If I did a little more. If I got up at five in the morning, no one would know I wasn't too smart." Id. at 743. He struggled through school and has since gone on to author five books, forty articles and over

As a consequence, in all aspects of education, the learning disabled have routinely been dismissed as failures. This is particularly so when educators rely on standardized testing.

> The use of traditional exam formats, such as multiple-choice, often merely serve to reflect a learning disabled's deficiencies. Experts in the field of handicapped students have found that although learning disabled students have the capability to

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thirty published opinions. He has taught at four major universities, including Columbia, and has even taught legal writing to judges.

Judge Gallet notes: "I'm learning disabled, and I'm always going to be learning disabled. There is no wonder drug; there is no operation. I won't outgrow it; it won't get better. It's a neurological disorder, a minor brain damage. It is a mental misfiring. When information comes in through my eyes or ears it doesn't always get to my brain and back to my hand or mouth exactly the way it's supposed to." Id. at 742.

Had Judge Gallet's grades been the only measure of his ability to undertake legal reasoning, he surely would not have become a lawyer, judge or author.

> learn their deficiencies in processing information cause them to learn differently. Further, experts have noted that generally, a learning disabled student's processing abilities are deficient only in one or a small number of areas. Consequently, scholars in the area of learning disabilities have found that by allowing alternate test formats, learning disabled students were able to show their abilities rather than disabilities.

Id. at 1057-1058 (footnotes omitted).

Although in theory "tests are supposed to measure one's abilities . . . in certain cases, test results may not even closely reflect such abilities. Unfortunately for many however, convenience and efficiency has significantly influenced how . . . faculty measure the abilities of . . . students." Rothstein, Section 504 of The Rehabilitation Act: Emerging Issues for Colleges and Universities, 13 J.Col. & Univ. L. No. 37, 229, 252-53

(1986).

Because, like other civil rights acts, the purpose of Section 504 is to "achieve equality in employment opportunities and remove barriers that have operated in the past to favor an identifiable group . . . practices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to freeze status quo of prior discriminatory . . . practices." See Griggs v. Duke Power Company, 401 U.S. 424, 429-434 (1971). Although Tufts' policy of requiring Written (Type K) multiple choice examinations on biochemistry do not "facially discriminate" against students suffering specific learning disabilities such as dyslexia, c.f. International Union, UAW v. Johnson Controls, ___U.S. __, 111 S.Ct. 1196 (1991), it in fact so

discriminates, and petitioner must have a reasonable opportunity to challenge that policy.

Whatever deference is appropriate to academic decision-making in other contexts does not permit a court in a Section 504 action to avoid the judicial scrutiny required to prevent denial of benefits to an otherwise qualified handicapped person solely because of the handicap. See Pushkin v. Regents of University of Colorado, 658 F.2d 1372, 1384 (10th Cir. 1981); Cannon v. University of Chicago, 441 U.S. 677, 709-710 (1979) (judicial scrutiny of university admissions decisions required in Title IX, 20 U.S.C. s. 1681, action). Such scrutinity necessarily requires serious attention to alternatives which will not exclude the handicapped person from participation in and enjoying the

benefits of the program. Such scrutiny is especially important when the academic institution claims that the discriminatory format is an essential part of its program.

The appropriate standard for analyzing Tufts' decision is not whether its written multiple choice examination format is the fairest way to test most students, but whether it denies an otherwise qualified handicapped person the benefits of Tufts' program and a career in medicine. Tufts' explanations nowhere address this basic and fundamental issue in this case and the Court of Appeals fails to give any consideration to this core feature of Wynne's claim. At no critical point did relevant decision-makers take into account the distortive effects of the testing on an individual in his position who is handicapped by a significant

learning disability.

Respondent's efforts to characterize petitioner notwithstanding, he does not lack the basic intelligence necessary to be a competent physician. The respondent's ability to exclude him from the profession of his choice because of his failing of this form of examination merely serves to reinforce the social stereotypes which have stigmatized persons with dyslexia and which the Rehabilitation Act of 1973 was designed to overcome. Petitioner holds a Masters Degree in Biology and has struggled valiantly against the effects of his learning disability, standing in the company of many ultimately successful persons who were learning disabled, including Albert Einstein, Thomas Edison, Simon Bolivar, Winston Churchill, George Patton, Nelson Rockefeller and Woodrow

Wilson.

Respondent's "academic freedom" should not allow it to avoid its obligations under statute and regulation. See 34 C.F.R. s. 104.44 Because this matter involves subtle issues of discrimination and unconscious prejudice which can only be resolved by a careful examination of the decision making process, petitioner should have been permitted to discover whether the reasons advanced in Tufts's affidavits are bona fide rather than a pretext, conscious or unconscious. Academic freedom notwithstanding the subtleties of discrimination require full discovery. See University of Pennsylvania v. Equal Opportunity Commission, 493 U.S. 182, 187-188, 195-201 (1990)(first amendment protections do not shield university from statutory prohibitions against discrimination) and agency discovery of confidential materials).

Although Tufts decries the suggestion of a discriminatory motive in its multiple choice testing requirement, whether or not it intended to discriminate against Wynne because of his handicap is irrelevant, inasmuch as the impact of its testing requirement has a disparate effect on Mr. Wynne by virtue of the nature of his handicap. See Alexander v. Choate, 469 U.S. 287, 296 (1985) ("much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent."); Brennan v. Stewart, 834 F.2d 1248, 1261 (5th Cir. 1988). If Tufts' affidavits suggesting that the written multiple choice format is the only academically appropriate way to test

in Biochemistry can be in any way deemed uncontradicted--despite evidence that Brown University School of Medicine does not feel bound to require such written examinations for purposes of testing the same skills and that the National Board of Registry in Medicine will provide a reader to assist dyslexic examinees Type K tests--they are only uncontradicted because petitioner has been denied the opportunity by the district court to discover the genuine rationale for such testing, has been denied the opportunity to inquire in any way as to when and under what circumstances the decision to require such testing was actually made and to what extent, if any, it took into account the barrier such testing created for dyslexic students, to discover facts necessary to show that, as in other contexts, the testing format is a matter of "convenience and efficiency" rather

than of academic necessity.

II. IN UPHOLDING SUMMARY JUDGMENT FOR TUFTS WHEN WYNNE WAS DENIED THE OPPORTUNITY TO CONDUCT MEANINGFUL DISCOVERY ON THE ISSUE OF THE CRITERIA USED BY TUFTS IN REFUSING TO ACCOMMODATE HIM IN ITS TESTING PROCEDURES, THE COURT OF APPEALS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION.

Although appearing to rest its

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[3] The Court of Appeals also suggests that Tufts could not be held to discriminate because it did not know that petitioner suffered from dyslexia. The intent to discriminate is not relevant to the outcome, however, since the act is intended to protect against ignorance as much as against invidious intent. See Alexander, 469 U.S. at 295. In any event, the record is clear that a reasonable fact finder could conclude, on the basis of the Rey-Casserly report, that respondent had reason to know that petitioner suffered from a specific learning disability, a handicapping condition, which interfered with a major life activity. See 34 C.F.R. s. 104.3(j)(2)(i)(B).

decision to uphold summary judgment on principles established by this Court in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986), p. A.11, the First Circuit in fact violates principles of Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)("Rule 56(c) mandates the entry of summary judgment [only] after adequate time for discovery [emphasis added] . . .").

Here the district court suspended discovery and prevented petitioner from inquiring in any way about the purposes of multiple choice testing, about when the educators first concluded that this was a matter of substance rather than of form (whether before or after this litigation began), about who had reached that decision and how it was codified, about whether it had included any explicit consideration of possible impact

on handicapped persons suffering from specific learning disabilities such as petitioner, and about whether any alternative means had ever been seriously considered to test persons suffering from such disabilities.

The First Circuit, in a series of decisions upholding summary judgment, ostensibly in accordance with the Celotex rule, has extended the respondent's right to summary judgment even in discrimination cases in which issues of intent or state of mind arise. See Mesnick v. General Electric Co., 950 F.2d 816 (1st Cir. 1991), cert. denied, __U.S. __, 112 S.Ct. 2965 (1992) and other cases cited below, pp. A.10-11; A.21-22. While such extension may well be justifiable in other cases, in this case it goes so far as to permit summary judgment even when petitioner has not been given the right to complete discovery, to test the

allegations set forth in respondent's affidavits or to uncover evidence in respondent's possession which would undermine the propositions which respondent advances that it is unable to maintain its academic standards consistently with administering an examination in biochemistry other than by the standard written multiple choice format.

Indeed, the Court of Appeals' rationale depends on the concept that a petitioner such as this may not make a claim, may not discover elements necessary to his case and may not challenge a decision of academicians as discriminatory so long as the academicians state that their motivation is non-discriminatory and provide a rational academic basis for the decision. In effect, the decision insulates the

academic community from discrimination laws and provide barriers to litigation under the Rehabilitation Act which are largely insurmountable for any litigant handicapped by learning disability.

Under the court of appeals decision, a handicapped claimant's case against an academic institution can be cut off at inception regardless of how meritorious the claim or how clear the discriminatory impact of the academic institution's decision as long as the latter avers that its decision is academically rational. Contrary to the purpose of section 504, such a decision will effectively bar otherwise qualified handicapped persons from participation in the medical profession. Contrary to constitutional principles and basic principles of justice, the decision effectively denies such a handicapped person access to legal redress before a jury in determining the

facts of his or her case, including whether or not he or she is in fact otherwise qualified and whether or not the institution has reasonably accommodated him or her.

No recorded decision under Section 504 goes so far as to permit summary judgment and deny a jury trial under these circumstances. Indeed, although cryptically cloaked in caselaw precedent, no prior decision of this court is authority for the procedures adopted below.

Having foreclosed discovery from Tufts, and giving no weight to Wynne's evidence that with accommodation he could pass the biochemistry exam and withstand the rigors of medical school education or that other medical schools and medical examiners have found satisfactory alternatives to written multiple choice

examinations, the Court of Appeals concludes that the "undisputed facts demonstrat[e] . . . that Tufts' hierarchy 'considered alternative means' and 'came to a rationally justifiable conclusion' regarding such putative accommodations." Appendix, p. A.14, citing Wynne, 932 F.2d at 26. The problem with its approach is not that Tufts failed "to document[] the importance of biochemistry" or why it claims "'the multiple choice format provides the fairest way to test the students' mastery of the subject matter of biochemistry.'" Rather the problem is that Wynne was precluded from showing anything to the contrary. He was not permitted to inquire of Tufts through discovery, and his independent evidence that other academicians have reached the opposite conclusion was totally ignored. Tufts was found as a matter of law to have satisfied the requirements of

Section 504 merely upon its unilateral averments, making it its own judge and jury.

Such a conclusion goes well beyond any previous judicial deference to the principle of academic freedom and largely eviscerates the protection of Section 504 to the learning disabled population in the academic context, where it is obviously the most important and most necessary.

The First Circuit has impermissibly sought to carve out a form of qualified immunity for academic institutions on the question of reasonableness of accommodation under Section 504. See Wynne, 932 F.2d at 26; p. A.56. Although modelled on qualified immunity enjoyed by government officials for civil damages when their actions did not violate clearly established rights, id., in part

the First Circuit has created even greater protection to the academic institution then for the government official since, although petitioner's allegation stated a claim of violation of clearly established law, he was not permitted the discovery which would be permitted in the governmental qualified immunity context. See Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) ("Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery. (citation omitted) Even if the plaintiff's complaint adequately alleges the commission of acts that violate clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as

to whether the defendant in fact committed those acts [emphasis added].").

III. THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

Although Section 504 does not require that educational institutions lower their standards or make "substantial" modifications to make their programs accessible to handicapped persons, "the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons" may not always be clear. Southeastern Community College v. Davis, 422 U.S. 397, 411-412 (1979) and accommodations may at times be required. "The balance struck in Davis requires that an otherwise qualified handicapped individual must be provided with

meaningful benefit that the grantee offers. . . . [T]o assure meaningful access, reasonable accommodations in the grantee's program may have to be made." Wynne, 932 F.2d at 24, quoting Alexander, 469 U.S. at 300-301 (1985). "The issue . . . is whether there is a reasonable accommodation to Wynne's disability that can be made by Tufts so as to give him 'meaningful access' to the medical education offered there." Original panel decision, p. A.91.

The point of Davis which was original and correctly recognized in 1990 by the Appeals Court's panel is that if petitioner's dyslexia does not limit his ability to be a physician, he may not be denied his chance to be a doctor solely because he is dyslexic. See Davis, 442 U.S. at 413. By the Court of Appeal's subsequent analysis, however, a court must abandon the original reasoning of

Davis and avoid any inquiry into whether the school's requirement of multiple-choice testing effectively discriminates against a dyslexic student, or whether a reasonable non-discriminatory alternative exists if the school articulates any academic rationale for its exclusive use of another multiple-choice test. By any analysis, there is absolutely no authority which supports such an imposition of blinders upon the courts, including case law which has recognized and defined the scope of constitutional protections to academic freedom. The Court of Appeals has effectively ruled that Tufts and Tufts alone may determine how it will test and what if any accommodation it will give to persons whose physical conditions preclude effective testing by such method.

IV. THE PROCEDURES ADOPTED BY THE COURT OF APPEALS IN ITS DECISION IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

The First Circuit's decision in this case conflicts with those of seven other circuits in one way or another.

1. "Otherwise Qualified" and "Reasonableness of Accommodation."

First, the First Circuit has ruled that the question of whether a student is otherwise qualified and the related question of whether proferred accommodations are reasonable are capable of resolution by the court as a question of law upon the filing of affidavits by the defendant academic institution. The First Circuit rule is far more favorable to defendant academic institutions and creates a far greater burden for the handicapped student than that of any other circuit which has considered the issue.

The Second Circuit refused to permit summary judgment in favor of a medical school and against a mentally handicapped applicant because, although the applicant had not shown a likelihood of success on the merits, the issue of whether, despite her handicap, she was at best as qualified as other applicants was a substantial issue of material fact incapable of resolution as a matter of law. Doe v. New York University, 666 F.2d 761, 779-80 (1988).

The Fifth Circuit has held that under section 504, "whether a person is 'otherwise qualified' appears to be a question of fact," permitting summary judgment only if "reasonable means could not have differed from the conclusion that [claimant] was not 'otherwise qualified.'" Brennan, 834 F.2d at 1260. As part of the same inquiry the

"reasonable accommodation" question is also reserved for the trial court or jury as a question of fact. Id. at 1262.

The Fifth Circuit has recognized the "paradoxical quality" of the phrase "otherwise qualified." Id. at 1261. "[O]n the one hand, it refers to a person who has the abilities or characteristics sought by the grantee; but on the other, it cannot refer only to those already capable of meeting all the requirements--or else no reasonable requirement could ever violate s. 504, no matter how easy it would be to accommodate handicapped individuals who cannot fulfill it. . . . The question after Alexander is the rather mushy one of whether some 'reasonable accommodation' is available to satisfy the reasonable interests of both the grantee and the handicapped person. And since it is part of the 'otherwise qualified' inquiry, our

precedent requires that the 'reasonable accommodation' question be decided as an issue of fact--meaning, of course, that it is one for the trial court or jury, subject to 'clearly erroneous' . . . review only." Id. at 1261-62 [citations omitted]. The Brennan court, properly returned the case to the district court because it "mistakenly threw out all of [the] s. 504 claims, as there are no fact-findings on the now-crucial questions of 'meaningful access' and 'reasonable accommodation.'" Id. at 1262. Having entered summary judgment on the mere grounds that Tufts has articulated an academic rationale from its testing procedures without meaningful inquiring into the effects of such procedures on the dyslexic student, the First Circuit has turned a question of fact into a question of law.

The Sixth Circuit also recognizes that the issues of "otherwise qualified" and "reasonableness of accommodation" are not ordinarily susceptible to resolution as a question of law through summary judgment. Although the district court was upheld in dismissing a handicapped student's Section 504 claim in Doherty v. Southern College of Optometry, 862 F.2d 570 (6th Cir. 1989), cert. denied, 493 U.S. 810 (1990), such dismissal came after a full trial, after the student (presumably) had the benefit of full discovery, after both parties had the opportunity to present evidence and cross-examine adverse witneses, after all experts testified that the defendant's academic requirement concerning the need for clinical preferring in the use of four instruments (which plaintiff admitted he could not meet) was "reasonable and desirable." Id., 862

F.2d at 574. None of these conditions was required by the First Circuit.

Accordingly, in order to ensure that justice is applied even-handedly in all circuits and that Section 504 is uniformly enforced throughout the nation, the Court should set appropriate national standards for summary judgment in this context.

2. "Reason to know" of handicap.

The First Circuit lends credence to Tufts' claim that it never knew that Wynne needed any particular accommodation because it did not realize that he was dyslexic. It continues to emphasize that the formal diagnosis was made only after Tufts had already dismissed Wynne. However, Tufts, a medical institution with ready access to the necessary resources to make such a diagnosis, had all the evidence that it needed to

understand that Wynne suffered from dyslexia. Dyslexia is a medical diagnosis, and yet at Tufts' request, he was evaluated by a psychologist who could not properly make such a diagnosis. See Pucket, The Education Annotation of International Classification of Diseases-Clinical Medicine at 686 (1989). Nevertheless, Tufts' psychologist, Dr. Rey-Casserly, specifically found that Wynne "neurological profile has been identified in the learning disabled population." These were associated with Wynne's complaints of "difficulties with complex multiple choice questions" and difficulties with standardized tests." App. 473.

Tufts' insistence that it did not have a formal diagnosis that Wynne was dyslexic puts semantic form before substance. The very information which Tufts acquired from Dr. Rey-Casserly

clearly gave Tufts notice of Wynne's learning disability.

Whether or not Tufts actually had in its hands the formal diagnosis of "dyslexia," is largely irrelevant since it had sufficient notice that he suffered a significant learning disability which interfered with his ability to take certain types of tests. Tufts' testing disclosed to Tufts that Wynne suffered a handicap which impaired his ability to take Type K multiple choice tests as compared to other forms of tests in which he did demonstratively better. For the Court of Appeals to lend weight to Tuft's omission in providing a formal diagnosis of dyslexia is inconsistent with its obligation to view the facts most favorably to the non-moving party. See Medina-Munoz v. R.J. Reynolds Tobacco Company, 896 F.2d 5, 7-8 (1st Cir. 1990).

In contrast, the Third Circuit in Nathanson, 926 F.2d at 1381-86, reversed summary judgment for a medical student and against a student under a section 504 claim recognizing genuine issues of material fact as to whether the school had reason to know of the handicap, whether the student had requested accommodations and whether the school provided reasonable accommodations or evidenced "benign neglect" of the handicapped person, without intent to discriminate. The summary judgment motion arose after adequate time for discovery. See id. at 1393 (Alito, J. dissenting).

The court in Nathanson recognized that whether the student's written and oral statements concerning her handicapping condition and her requests for accommodations were sufficiently "direct and specific" to give notice to

the defendant medical school was material issue of fact precluding summary judgment. See id. at 1381-1382. The student's statements are probably more ambiguous than those which Petitioner swears he made to relevant decision-makers and Tufts' own neuropsychological testing of petitioner surely create an issue of fact on the issue of knowledge sufficient to preclude summary judgment under the criteria of the Third Circuit.

It is incumbent upon the Court to resolve the issue of the criteria to be applied in determining the requisite level of knowledge to preclude summary judgment in such a case.

3. Standardized Examination of Dyslexic Persons.

The First Circuit is unique among the Circuit Courts of Appeal which have considered the use of standardized

examinations to test the skills, knowledge or abilities of persons handicapped by dyslexia in that it has refused to consider the plainly distortive discriminating impact of such a testing procedure and the obvious violation of Section 504 in its employment.

In Brookhart v. Illinois State of Educ., 697 F.2d 79 (7th Cir. 1983), the 7th Circuit held in reviewing the decision of a state board in education concerning the administration of minimum competency tests to handicapped children that "deference is due the School District's education and curricular decisions," id. at 182, "an otherwise qualified student who is unable to disclose the degree of learning he actually possesses because of the test format or environment_ would be the object of discrimination solely on the

basis of his handicap . . .[F]ederal law [s. 504] requires administrative modification to minimize the effects of plaintiff's handicaps on any future examinations." Id. at 184.

In Stutts v. Freeman, 694 F.2d 666 (8th Cir. 1983), the Eighth Circuit recognized that use by the Tennessee Valley Authority ("TVA") of the standardized test "to predict the probability of success of an applicant in the training program" violated s. 504 when the "test" cannot and does not accurately reflect the abilities of a handicapped person." Id. at 669. The court, unlike the First Circuit, considered the claimant's evidence that, despite his dyslexia (which distorted test results), he was capable of meeting the requirements of the job and "could successfully complete the training

program, either with the help of a reader or by other means," id at 668-69, and reversed summary judgment.

4. "Pretext" in the Section 504 Context

The First Circuit chose to dismiss as "conclusory allegations, improbabe inferences, . . . unsupported speculation . . . rancorous epithets and . . . tenuous insinuations[,] more cry than wool," p. A.22 (internal quotations and citations omitted), numerous pieces of evidence proferred by petitioner in support of his contention that Tufts' rationale was pretextual on the issue of discrimination on the basis of handicap. Petitioner had offered evidence of statements of Dean Bank that his disbelieved that Wynne was disabled, p. A.240; statements of Dean Griffin that the promotions committee would not approve individualized oral examinations

for him because "[t]he school already threw you out. The faculty feels they should be the ones to decide who they teach medicine to, not the deans, p. A.240; statements of his faculty "advocate" Dr. Busch, that Tufts is no place for a learning disabled student and that he should become a pilot, p. A.238; that the tutors assigned to help him were either unfamiliar with biochemistry or unwilling to assist him with the form of the exam, pp. A.242-43, paras. 38-40; the statements of Dr. Feinblatt to the student Appeals committee, misinforming its members that the biochemistry examination was all essay, pp. A.243-44, para. 43; and Dr. Stollar's admission that he perceives that "there are very strict limits on our ability to alter our medical school program and curriculum to accommodate students with learning disabilities," p. A.261, para. 16.

Without further defining what it would require to raise a "genuine issue of material fact" on the subject pretext or when a claimant will be permitted discovery on the issue, the First Circuit appears to be expecting evidence of hostility or overt discriminatory animus before it will reverse summary judgment under these circumstances.

In contrast, the 10th Circuit has adopted the approach suggested by this Court in Alexander, recognizing that pretext in the Section 504 context will often be subtle and evidenced by "benign neglect":

> It would be a rare case indeed in which a hostile discrimatory purpose or subjective intent to discriminate solely on the basis of handicap could be shown. Discrimination on the basis of handicap usually results from more invidious causative elements and often occurs under the guise of extending a helping hand or a mistaken, restrictive belief as to

> the limitations of handicapped persons.

Pushkin, 658 F.2d at 1385. See also Nathanson, 926 F.2d at 1384-86.

The First Circuit too narrowly constricts the application of Section 504 in the academic setting and fails to afford protection to persons and situations clearly within the scope of the act's protection. This Court should bring conformity to the approaches of these different Circuit Courts of Appeals in defining what will constitute "pretext" under Section 504.

CONCLUSION

For the foregoing reasons, petitioner urges that the court grant certiorari.

Respectfully submitted,

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